No. 82-1295

IN THE

# Supreme Court of the United States

October Term, 1982

ESCAMBIA COUNTY, FLORIDA, *et al.*,
*Appellants,*

v.

HENRY T. McMILLAN, *et al.*,
*Appellees.*

**ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

## BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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Appellants Escambia County, Florida ("Escambia") and the members of the Escambia Board of County Commissioners ("County Commission"), through counsel, submit this Opposition to the Motion to Affirm or Dismiss ("Motion") filed by appellees in the above-captioned matter.

## ARGUMENT

### I. The Clearly Erroneous Standard Does Not Insulate the District Court's Findings from Appellate Review.

Appellees' arguments in support of their contention that the district court's finding of vote dilution under the fourteenth amendment must be affirmed as not clearly erroneous reflect a fundamental misunderstanding of the clearly erroneous standard of Fed.R.Civ.P. 52(a). Contrary to the assumption of ap-

pellees, that standard does not insulate a trial court's findings of fact from appellate review. While the findings of fact of the trial court are entitled to deference, they must be set aside as clearly erroneous if, "although there is evidence to support . . . [them], the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."[1]

In their Jurisdictional Statement (or "J.S."), at 22-26, appellants showed that the record fails to support either the district court's finding of discriminatory intent or its subsidiary findings. In contrast, appellees' motion contains not one reference to the record in this case. Instead, appellees simply reiterate the district court's findings. For the most part, appellants do not contend that the district court did not make the findings appellees claim it made. Appellants, however, do contend that the record shows an absence of discriminatory intent behind the establishment and maintenance of the at-large system of electing Escambia's County Commissioners.

The Fifth Circuit also seems to have suffered from the same misunderstanding of the clearly erroneous standard as appellees. In its initial decision, *McMillan v. Escambia County, Florida* (*"McMillan I"*),[2] the Fifth Circuit correctly articulated the standard this Court adopted in *Rogers v. Lodge*[3]:

> Fortunately, the district court below correctly anticipated that the *Arlington Heights* requirement of purposeful discrimination must be met, and thus made explicit findings concerning intent in addition to and apart from its *Zimmer* findings. Accordingly, there is no need to remand the case for a determina-

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[1]United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948); *accord, e.g.*, Kelley v. Southern Pacific Co., 419 U.S. 318, 322-23 (1974); Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123 (1969).

[2]638 F.2d 1239 (5th Cir. 1981) (J.S. at 30a).

[3]___U.S. ___, 102 S.Ct. 3272 (1982). *See* Jurisdictional Statement at 18-20.

tion of whether purposeful discrimination exists.[4]

Applying this standard, the court reviewed the entire record "and found no evidence of racial motivation by the county commissioners in retaining the at-large system."[5]

In its decision on rehearing, *McMillan v. Escambia County, Florida* (*"McMillan III"*),[6] the Fifth Circuit, like appellees,

[4]*McMillan I,* 638 F.2d at 1243-44 (J.S. at 39a-40a); *compare with Rogers,* 102 S.Ct. at 3278

> (The District Court . . . demonstrated its understanding of the controlling standard by observing that a determination of discriminatory intent is 'a requisite to a finding of unconstitutional vote dilution' under the Fourteenth and Fifteenth Amendments . . . . Furthermore, while recognizing that the evidentiary factors identified in *Zimmer* were to be considered, the District Court was aware that it was 'not limited in its determination only to the *Zimmer* factors' but could consider other relevant factors as well.).

[5]*McMillan I,* 638 F.2d at 1245 (J.S. at 42a). In discussing this aspect of the decision, appellees argue that the Fifth Circuit's rejection of the district court's inference of discriminatory intent from the Commissioners' expression of desire to retain their incumbency was based on a misunderstanding of the district court's reasoning. Motion at 6. Appellees contend that "the District Court had not grounded its finding of racial intent on the commissioners' 'motive to exclude *all* other potential candidates, as the Court of Appeals thought . . . but on their motive to exclude black potential candidates specifically.' " *Id.*

The Fifth Circuit did not misunderstand the district court but, correctly, disagreed with the inference the court drew. The district court had inferred that, under a single-member district election system, the possibility existed of "one or more of... [the Commissioners] being displaced in subsequent elections by blacks." McMillan v. Escambia County, Florida, PCA No. 77-0432, typescript op. at 31 (N.D.Fla. July 10, 1978) (J.S. at 98a). However, even assuming, arguendo, that the desire to retain one's incumbency could be translated into discriminatory intent, that would not explain the Commissioners' unanimous preference for the at-large system. Assuming blacks vote as a bloc, the imposition of a single-member district system under the facts of this case would result in only one of the commissioners being displaced by a black. Certainly, commissioners residing in the non-black districts would not be concerned about being replaced by blacks.

[6]688 F.2d 960 (5th Cir. 1982) (J.S. at 1a).

simply reiterated the district court's findings. Even though the applicable legal standard had not changed and no new evidence had been introduced, the court vacated the portion of its decision in *McMillan I* concerning the County Commission and upheld the district court's finding of discriminatory intent. These actions are explainable only on the grounds that the Fifth Circuit incorrectly interpreted the clearly erroneous standard as precluding it from disturbing the district court's findings.

This Court's decision in *Rogers* leaves no doubt that the validity of an at-large election system under the fourteenth amendment depends upon the determination of whether that system was created or is maintained for a discriminatory purpose, and that that determination is a purely factual matter.[7] Suits challenging election systems have potentially far reaching consequences for the legislative body against which suit is brought as well as the persons governed by that legislative body. In view of the enormous impact a successful challenge to an election system is likely to have, the findings of the trial court must not be allowed to stand without careful review by an appellate court. Such review is lacking in this case and now must be undertaken by this Court to correct the clearly erroneous findings of the district court.[8]

## II. The Result Appellants Have Urged Is Not Changed by the 1982 Amendments to Section 2 of the Voting Rights Act of 1965.

Appellees next contend that amended section 2 of the Voting

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[7]102 S.Ct. at 3276-79.

[8]Appellees claim that the evidence in this case of discriminatory intent is more "overwhelming" than the evidence in *Rogers*. Motion at 3. This contention is refuted even by the district court: "The conclusion impelled and reached is that at least the preponderance – *though not an overwhelming preponderance* – of the evidence supports plaintiffs' contentions . . . ." McMillan v. Escambia County, Fla., PCA No. 77-0432, typescript op. at 35 (N.D. Fla. July 10, 1978) (emphasis added) (J.S. at 103a).

Rights Act of 1965[9] immediately became applicable to this suit and affords an alternative ground for affirmance of the Fifth Circuit's decision in *McMillan III*.[10] Appellees, however, overlook the fact that this was precisely the situation which confronted this Court in *Rogers*. Plaintiffs in *Rogers* had alleged a violation of section 2,[11] and amended section 2 was in effect prior to this Court's decision. This Court repeatedly has held that, when possible, a suit must be resolved on statutory, rather than constitutional, grounds.[12] Nevertheless, the Court based its decision in *Rogers* exclusively on the fourteenth amendment. The allegations of the plaintiffs in *Rogers* were identical to the allegations of appellees herein. Accordingly, the reasons which led the Court not to decide *Rogers* under amended section 2 are equally applicable to the instant suit.

Even assuming, arguendo, that amended section 2 is applicable to appellees' claims and allows a private right of action,[13] appellees still would not prevail. As appellees point out,[14] the intent of Congress in amending section 2 was to allow a violation of section 2 to be established by a showing of discriminatory result and to obviate the need to prove discriminatory intent.[15] That section, however, specifical-

[9]42 U.S.C. § 1973 (1976), *as amended by* Voting Rights Act Amendments of 1982, Pub.L.No. 97-205, § 3, 96 Stat. 131, 134 (1982).

[10]Motion at 8, 9 n.6.

[11]*See* Lodge v. Buxton, 639 F.2d 1358, 1360 (5th Cir. 1981), *aff'd sub nom. Rogers*.

[12]*E.g.*, United States v. Clark, 445 U.S. 23, 27 (1980); Spector Motor Serv., Inc. v. McLaughlin, 323 U.S. 101, 105 (1944).

[13]*See* City of Mobile, Ala. v. Bolden, 446 U.S. 55, 60 (1980).

[14]Motion at 10.

[15]S.Rep.No. 417, 97th Cong., 2d Sess. 27-28.

Appellees' reliance on the portion of the legislative history which refers to this suit, Motion at 9-10, is, at best, questionable because, as the hearings on the 1982 amendments show, counsel for appellees were largely responsible for the portion of the legislative history appellees quote, *see* Extension of the Voting Rights Act: Hearings on

ly provides that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion of the population." In their Jurisdictional Statement, at 22-26, appellants showed that the factors which, if proven, could satisfy the results test are absent in this case, that the district court's findings to the contrary are clearly erroneous and that all appellees have proven is that blacks have not been elected to the County Commission in proportion to their percentage of the population. Under these circumstances, amended section 2 affords appellees no relief.

## III. The Decisions of this Court and Controlling Florida Law Establish that the Courts Below Erred in Disregarding the Remedial Election System the County Commission Submitted and, Instead, Ordering the Implementation of a Court-Ordered System.

Finally, appellees argue that, following the decision striking down the at-large system, *Wise v. Lipscomb*[16] and Florida law prohibit the County Commission from adopting a remedial election system for consideration as a "legislative plan."[17] There is a variety of flaws in the arguments appellees have advanced.

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H.R. 3112 Before the Subcomm. on Civil and Constitutional Rights, Comm. on the Judiciary, 97th Cong., 1st Sess. 418-40, 2029-65 (testimonies of Jack Greenberg and James U. Blacksher).

[16]437 U.S. 535 (1978).

[17]Motion at 12-15. In their Motion, at 12 n. 7, appellees suggest that this appeal may not be ripe for review because, on remand, the district court was reconsidering "the exact configuration" of the five single-member district election system the court had ordered in 1979. Even if appellees' argument had some merit, it no longer does because the court now has ordered into effect the same five single-member district election system it ordered in 1979. McMillan v. Escambia County, Fla., PCA No. 77-0432 (N.D.Fla. Mar. 11, 1983) (Order). The Court ordered this system to be implemented because it concluded that none of the exceptions to the "law of the case" doctrine was applicable, and that, therefore, that doctrine required it to carry out the Fifth Circuit's

Firstly, appellees contend that, if appellants' arguments were accepted, the County Commission would become possessed with a "legislative power" it does not possess because that power is "reserved by the Florida Constitution to the legislature, except in those instances where counties adopt home rule charters."[18] Appellees' contention is wrong. Article III, section 11(a)(1) of the Florida Constitution expressly prohibits the Florida

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mandate. McMillan v. Escambia County, Fla., PCA No. 77-0432 typescript op. at 11 (N.D.Fla. Mar. 11, 1983) (Memorandum Decision).

Although the court's decision essentially was based on the "law of the case" doctrine, the court considered the merits of the election system the County Commission proposed following a hearing concerning the remedy on February 9, 1983, at which the court suggested that the County Commission submit a remedy for consideration as a "legislative plan." That system provided for five commissioners to be elected from single-member districts and two commissioners to be elected at-large. The Court indicated its disapproval of such a system because, even with one district gerrymandered to provide a majority of black registered voters, the system would not allow blacks the opportunity to elect commissioners in proportion to their percentage of the population. *Id.* at 13. Previously, in McMillan v. Escambia County, Fla., PCA No. 77-0432 (N.D. Fla. Sept. 24, 1979) (J.S. at 66a), the court had criticized an election system the County Commission had proposed similar to the above-described system also on the grounds that it failed to afford blacks the opportunity for proportional representation. *Id.* at 3.

When this suit was filed, blacks were approximately 19.7% of the population and 17% of the registered voters. *See* Jurisdictional Statement at 3-5. At present, blacks are approximately 19.7% of the population and 15% of the registered voters. *See* McMillan v. Escambia County, Fla., PCA No. 77-0432, typescript op. at 12 n.3 (N.D. Fla. Mar. 11, 1983). The conclusion appellants have drawn from the court's decisions is that, regardless of whether the County Commission should have been allowed to submit a "legislative plan," the court would not have implemented any election system which did not assure blacks of more than proportional representation. Such a basis for rejecting a "legislative plan" is, of course, improper. *See* White v. Regester, 412 U.S. 755, 765-66 (1973); Whitcomb v. Chavis, 403 U.S. 124, 149-50 (1971).

[18]Motion at 13-14.

Legislature from enacting laws concerning elections in individual counties: "There shall be no special law or general law of local application pertaining to: (1) election. . . ." Therefore, under Justice White's analysis in *Wise*, the Legislature could not submit a remedial election system for consideration as a "legislative plan." Florida law, however, provides non-charter county commissions with broad powers with respect to matters of local concern. In addition to the provisions of Florida law discussed in the Jurisdictional Statement, at 26-29, Fla. Stat. § 125.01(3)(b) (1981) provides: "The provisions of this section shall be liberally construed in order to effectively carry out the purpose of this section and to secure for the counties the broad exercise of home rule powers authorized by the State Constitution." Section 125.01 (1981 & Supp. 1982) is fully applicable to non-charter counties[19] and, when juxtaposed with Fla. Const. art. III, § 11(a)(1), leaves no doubt that the "residuum of power" to which appellees refer[20] resides with the County Commission and not the Florida Legislature.

Secondly, appellees assert that this Court should apply the clearly erroneous standard of Fed.R.Civ.P.52(a) to the lower courts' interpretation of Florida law. Appellees' unsupported assertion is directly contrary to limitations this Court has recognized on that standard: "The [clearly erroneous] rule does not apply to conclusions of law."[21] Additionally, the lower courts' interpretation of Florida law is clearly erroneous. As discussed in the Jurisdictional Statement, at 28-29, the Florida Supreme Court has held that Florida law provides non-charter counties with expansive, rather than restrictive, powers. As also discussed in the Jurisdictional Statement, at 29 n. 123, the Florida Supreme Court's interpretation of Florida law is controlling and binding on federal courts. Hence, the interpretation

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[19]Speer v. Olson, 367 So.2d 207, 210-11 (Fla. 1978).

[20]Motion at 13.

[21]Pullman-Standard v. Swint, ___ U.S. ___, ___, 102 S.Ct. 1781, 1789 (1982).

of Florida law by the Fifth Circuit and the district court, which is in direct contravention of the interpretation by Florida's Supreme Court, may not stand.

Lastly, appellees' arguments concerning the remedy are based entirely on the assumption that the courts below were correct in adopting Justice White's analysis in *Wise*. In their Jurisdictional Statement, at 29 n. 124, appellees noted that, irrespective of the County Commission's power under state law to adopt a remedial election system, a different result would have obtained if the courts below had adopted Justice Powell's analysis in *Wise*. Indeed, the Fifth Circuit also recognized this: "In this case, . . . we are presented with a fact situation that under Justice White's analysis points to a court-imposed plan, but under Justice Powell's analysis would be considered a legislative plan."[22]

In *McDaniel v. Sanchez*,[23] the issue before the Court turned on whether the reapportionment plan the district court approved was a court-ordered plan or a "legislative plan." The reasoning which led to the Court's conclusion that the reapportionment plan was a "legislative plan" leaves no doubt that the Court adopted Justice Powell's analysis:

> The application of the statute [§ 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c (1976)] also is not dependent upon any showing that the Commissioners Court had authority under state law to enact the apportionment plan at issue in this case. As Justice Powell pointed out in *Wise v. Lipscomb, supra, the essential characteristic of a legislative plan is the exercise of legislative judgment.*[24]

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[22] *McMillan III*, 688 F.2d at 972 n. 25 (J.S. at 28a).

[23] 452 U.S. 130 (1981).

[24] *Id.* (footnote omitted) (emphasis added). In its Memorandum Decision on remand, the district court agreed that, in *McDaniel*, this Court adopted Justice Powell's analysis, and further recognized that it and the Fifth Circuit were wrong in concluding differently. McMillan v. Escambia County, Florida, PCA No. 77-0432, typescript op. at 7-8,

Accordingly, regardless of the County Commission's power under state law, the courts below should have considered the County Commission's proposed remedy as a "legislative plan" and accorded it the deference to which "legislative plans" are entitled. By disregarding the County Commission's "legislative plan," the courts below have deprived the County Commission of performing what this Court has recognized is a legislative task.[25] This Court must not sanction such an unwarranted intrusion into the legislative process by the federal courts.

## CONCLUSION

For the foregoing reasons, appellees' Motion to Affirm or Dismiss should be denied.

Respectfully submitted,

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11 (N.D. Fla. Mar. 11, 1983). Nevertheless, as discussed *supra* at 7 n. 17, the district court refused to alter the remedy.

[25] *See, E.g. Wise*, 437 U.S. at 540, 550.